

THE SECRETARY OF EDUCATION
WASHINGTON, D.C. 20202

June 14, 2002

Dear Colleague:

As you know, on January 8, 2002, President Bush signed into law the No Child Left Behind Act of 2001 (NCLBA). I am excited about this landmark legislation, as I believe it provides a critical road map for bringing about real improvement in student achievement.

The NCLBA will substantially affect the 2002-2003 school year, and given our short timeline for implementation, I wanted to provide you with preliminary guidance on public school choice, supplemental education services, and collective bargaining agreements--three key issues that will affect your planning processes for this fall. This guidance is not exhaustive and does not cover every possible nuance of the law. Rather, it is intended to give initial direction to you as you proceed this summer with implementing these programs for the start of the school year, with the understanding that additional guidance and/or draft regulations on these matters, as well as on other matters, will be provided in the near future. Once again, because the law requires implementation of these programs to begin this coming school year, I want to reiterate that your planning processes for this should be underway.

The context for public school choice, supplemental education services, and collective bargaining agreements is the accountability provisions in the Title I program. Under the NCLBA, each state must establish a definition of "adequate yearly progress" to use each year to determine the achievement of each school district and school. School districts must identify for improvement any Title I school that fails to meet the state's definition of adequate yearly progress for two consecutive years. Such schools, with technical assistance from their school districts, must develop and implement improvement plans incorporating various strategies to strengthen instruction in the core academic subjects in the school and addressing the specific issues that caused the school to fail. As discussed below, these schools must also provide public school choice and supplemental education services.

I. Public School Choice

In General. In the case of any Title I elementary or secondary school identified for school improvement, the school district is required to provide all students enrolled in the school with the option to transfer to another public school in the school district--which may include a public charter school--that has not been identified for improvement. This choice requirement applies unless state law specifically prohibits choice.

I recognize that some states and school districts have already begun planning for choice for the 2002-2003 school year. ***Indeed, the new choice requirements must be implemented beginning this fall.*** As you continue your planning, I strongly encourage you to provide several choice options for parents. Parents should be provided a reasonable amount of time to consider their Page 2

options, be given concise but detailed information on the performance and overall quality of the receiving schools, and be provided an opportunity to visit potential schools of choice.

Schools Identified for Improvement Prior to Enactment. The NCLBA includes specific transition provisions governing schools that were identified for improvement under the prior law. With one exception stated under the law, choice must be provided at the beginning of the 2002-2003 school year to all students in schools that have been identified for improvement (based on adequate yearly progress under the pre-NCLBA) as of January 7, 2002. The exception is if a school that is in school improvement on January 7 makes its second year of adequate yearly progress based on its 2002 assessment results, the district is not required to provide choice to the students in that school. ***School districts should begin planning now, if they have not begun already, to make choice available for students in any school that was in school improvement status as of January 7, 2002.***

Capacity. A school district is obligated to provide choice to all eligible students, subject to health and safety code requirements (regarding facility capacity). Transferring students should be treated as students who have moved into the receiving school's attendance zone and allowed to enroll in class and other activities on the same basis as other children in the school.

Priority for Low-Achieving Students in Low-Income Families. Among students exercising choice, school districts must give priority to the lowest-achieving students from low-income families. In other words, these students have priority among school options offered under the NCLBA and priority for transportation if funds for transportation are inadequate for that purpose. However, it would be inappropriate to remove students already accepted at a school to make room for those students exercising choice.

Magnet and Special Focus Schools. School districts need not disregard entrance requirements based on academic or other skills for schools for the gifted and talented, math or science schools, or other similar schools.

Transportation. If a student exercises the option to transfer to another public school, the school district has certain obligations to provide or pay for with federal funds the student's transportation to the new school. The school district's obligation

percent of its Title I, Part A allocation. Within the 20 percent, a district must spend: (1) an amount equal to 5 percent for choice-related transportation; (2) an amount equal to 5 percent for supplemental education services; and (3) an amount equal to 10 percent for transportation or supplemental education services, or both, as the district determines. This obligation may be satisfied through use of regular Title I, Part A funds, school improvement funds under Section 1003, or Title V, Part A funds. Additionally, school districts may use funds transferred to Title I from other federal education programs under Section 6123 to pay such costs. Programs eligible for such transfers include Title II, Part A Improving Teacher Quality State Grants; Title II, Part D Educational Technology State Grants; Title IV, Part A Safe and Drug-Free Schools and Communities State Grants; and Title V, Part A State Grants for Innovative Programs. Nothing in the NCLBA prohibits a district from spending more for transportation. Furthermore, a school district is not prohibited from spending state or local funds, if it wishes, to assist in paying for transportation.

The school district's obligation to provide transportation for the student ends at the end of the school year if the school from which the student transferred is no longer identified by the school district for school improvement, corrective action, or restructuring.

Desegregation. A school district that is subject to a desegregation plan--whether voluntary, court ordered, or under an agreement with a federal or state administrative agency--is not exempt from the public school choice requirements. In determining how to provide students with the option to transfer to another school, the school district may take into account the requirements of the desegregation plan. If a desegregation plan forbids the school district from offering any transfer option, the school district should secure appropriate changes to the plan to permit compliance with the public school choice requirements.

Cooperative Agreements with Other School Districts. There may be very limited circumstances under which public school choice may not be possible, particularly in some sparsely populated areas. For example, school districts with only one school at a particular grade level, or districts in which all schools at a grade level are identified for improvement, will not be able to offer choice. In such cases, districts are encouraged to establish cooperative agreements with other nearby school districts to permit transfers. Furthermore, in the very limited circumstances where choice is not possible and in accordance with the spirit of the NCLBA, I strongly encourage school districts to consider offering supplemental education services or other choices in curriculum or instruction such as distance learning.

II. Supplemental Education Services

In General. In the case of a Title I school in the second year of school improvement, the school district is required to arrange for the provision of supplemental education

services for eligible students enrolled in the school. The provider of the services must have a demonstrated record of effectiveness and be selected by parents from a list of providers approved by the state. These supplemental services must be provided beginning in the 2002-2003 school year. Supplemental education services are extra academic assistance for low-income students who are attending Title I schools that have failed to make adequate yearly progress for three or more years. The purpose of these services is to ensure that these students increase their academic achievement, particularly in reading, language arts, and mathematics. These academic services may include assistance such as tutoring, remediation, and academic intervention. Instruction must take place outside the regular school day, such as before or after school, on weekends, or during the summer. Supplemental education services must be of high quality, research based, and specifically designed to increase student academic achievement. Once again, I want to reiterate that the law requires that these opportunities be afforded to children beginning this fall.

Schools Identified for Improvement Prior to Enactment. Title I schools that have been identified for school improvement for two or more consecutive years as of January 7, 2002, *must* begin offering supplemental education services at the beginning of the 2002-2003 school year. As noted above, however, if a school in improvement on January 7 makes its second year of adequate yearly progress based on its 2002 assessment results, the district is not required to provide supplemental education services to eligible students in that school.

Parents. Parents choose the supplemental education services provider for their children from among the providers approved by the state for their school district. In general, the school district must work to ensure parents have good, easy-to-understand information about supplemental education services. School districts must provide parents with information on the availability of supplemental education services, the identity of approved service providers, and, at a minimum, a brief description of the services, qualifications, and demonstrated effectiveness of each provider. School districts may provide additional information, as appropriate. Such communications with parents must occur at least annually and must be in an understandable and uniform format. To the extent possible, communications must also be in a language parents can understand.

At the state level, parents should be consulted to promote participation by a greater variety of providers and to develop criteria for identifying high-quality providers. States, however, are ultimately responsible for identifying eligible providers from among which parents may choose.

At the provider level, parents, the school district, and the provider chosen by the parents must develop and identify specific academic achievement goals for the student, measures of student progress, and a timetable for improving achievement.

Eligible Children. Eligible children are those children from low-income families attending Title I schools that have failed to make adequate yearly progress for three consecutive years or more, as described above. In circumstances where more students request services than the school district can fund, the school district must place a priority on serving those low-income students who are the lowest achieving.

Per-Pupil Spending Limit. School districts are limited in how much they can spend to provide services for each child. The limit is what they receive in Title I funding per low-income child or the cost of the services themselves. Specifically, school districts must provide funding for supplemental education services for each participating child in an amount which is the lesser of the following: (1) the school district's Title I, Part A allocation, as determined by the state education agency, divided by the number of children from families below the poverty line (based on Census poverty data, not federal school lunch data) in the school district; or (2) the actual costs of the supplemental education services received by each child.

Identification by States of Supplemental Education Service Providers. State education agencies must develop and apply objective criteria for identifying supplemental education service providers. The state education agency must also consult with parents, teachers, school districts, and interested members of the public to identify a wide array of supplemental education service providers so that parents can have a wide variety of choices. The state education agency must update this state-level list of approved providers on at least an annual basis and must provide a list for school districts of those providers available in their geographic locations.

Criteria developed by the state education agency for identification of providers must include: (1) a demonstrated record of effectiveness in improving student academic achievement; (2) documentation that the instructional strategies used by the provider are high quality, based upon research, and designed to increase student academic achievement; (3) evidence that services are consistent with the instructional program of the school district and with state academic content standards; and (4) evidence that the provider is financially sound.

With respect to the first criterion, each state education agency is responsible for defining what would be acceptable evidence of effectiveness. Acceptable evidence may include significant improvement in student academic achievement, successful use of instructional practices based on sound research or of documented success by other providers, successful and sustained remediation of reading or math difficulties, or use of a program that others have successfully used to improve student academic achievement.

State education agencies may not require supplemental education service providers to hire only certified teachers in order to be eligible providers.

Providers shall not be disqualified on the grounds that their documentation of instructional strategies does not include "scientifically based research" (as such term is defined in the NCLBA).

Supplemental Education Service Providers. A school entity (public or private), an institution of higher education (public or private), or a nonprofit or for-profit organization can all be considered for inclusion on the state-approved list of supplemental education service providers. Faith-based organizations can also be considered for inclusion as state-approved providers. The state must apply all criteria consistently when selecting approved providers.

Distance-Learning Technology. Providers that utilize distance-learning technology do not have to meet different criteria; they are eligible if they meet the criteria established by the state education agency for all providers. The law states that providers must be within the school district or the providers' services must be reasonably available in neighboring education agencies. The provider of distance-learning supplemental education services does not have to be located in the school district to meet this requirement; only the services need to be available. We would encourage the use of distance learning in rural areas and other areas where parents have a limited number of providers available in their district.

Charter Schools. If a charter school, as a part of a school district, receives Title I, Part A funds and meets the eligibility criterion of being identified as a school that fails to make adequate yearly progress for three or more years, the school district must offer supplemental education services, and the school district is responsible for funding such services, just as for the other public schools in the school district.

If the charter school is itself considered a school district under state law and receives Title I, Part A funds, it is responsible for ensuring that eligible students receive supplemental education services from approved providers and must fund such services.

Transportation. School districts may, at their discretion, use funds reserved for supplemental education services to transport students to and from approved providers.

III. Collective Bargaining Agreements

The Department has received many inquiries regarding the impact of the new law on existing collective bargaining unit agreements. The NCLBA provides that nothing in Section 1116 (academic assessment and local education agency and school improvement) shall be construed to alter or otherwise affect the rights, remedies, and

procedures afforded school and school district employees under federal, state, or local laws or under the terms of collective bargaining agreements, memoranda of understanding, or other agreements between such employees and their employers. Section 1116 does not operate to invalidate employee protections that exist under current law and collective bargaining and similar labor agreements. However, it does not exempt state education agencies, local education agencies, and schools from compliance with Title I based on prospective collective bargaining or similar agreements or changes in state or local law. State and local education authorities, as well as state legislatures and local governing boards, need to ensure that changes in state and local laws are consistent with Title I requirements and that any changes to collective bargaining agreements or new agreements are also consistent with Title I.

With respect to the selection of supplemental education service providers, there is no requirement in the NCLBA that parents give preference to parties to the collective bargaining agreements. As you know, parents select the supplemental service provider, and parents are not parties to collective bargaining agreements.

Thank you again for your kind attention to these matters. Please let me reiterate that this letter is intended to provide preliminary guidance on public school choice, supplemental education services, and collective bargaining agreements. The Department will provide additional guidance and/or draft regulations on these matters, as well as other matters, in the near future. Please do not delay the planning process. I am hopeful that the new statute, together with this initial guidance, will enable you to promptly move ahead in preparation for the 2002-2003 school year.

Sincerely,

/s/

Rod Paige